

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202		
MICHAEL CERBO, Complainant, vs. COLORADO RIGHT TO WORK COMMITTEE Respondent.		▲ COURT USE ONLY ▲ CASE NUMBER: OS 20080007
AGENCY DECISION		

This matter is before the Office of Administrative Courts on the complaint of Michael Cerbo ("Complainant") against the Colorado Right to Work Committee ("Respondent" or "Issue Committee"). The complaint was filed with the Colorado Secretary of State ("Secretary") on April 8, 2008. On April 10, 2008 the Secretary referred the complaint to the Office of Administrative Courts as required by Colo. Const. art. XXVIII, § 9(2)(a). The case was referred to an Administrative Law Judge ("ALJ") and a hearing was held on July 29, 2008 in Denver, Colorado. The July 29 hearing was held before ALJ Michelle A. Norcross. Complainant was represented by Mark G. Grueskin, Esq. Respondent was represented by Scott E. Gessler, Esq. At hearing, the ALJ admitted exhibits 1 through 46, 133, and 134 into evidence. The proceedings were digitally recorded in courtroom 2. In addition, by arrangement of the parties, the proceedings were also recorded by a court report from the reporting service of Agren Blando Court Reporting & Video Inc. Per agreement of the parties, the court reporter's record is the official transcript of these proceedings.

Parties' Positions

Complainant: Complainant argues that Respondent violated the reporting requirements of the Fair Campaign Practices Act ("FCPA") by failing to timely register as an issue committee with the Secretary and by failing to fully and accurately disclose all its contributions and expenditures in reports that were filed with the Secretary. Complainant seeks the imposition of penalties against Respondent in the amount of \$127,600 for the alleged violations.

Respondent: Respondent contends that it has complied with all Colorado's campaign disclosure laws by timely registering as an issue committee and by disclosing all its contributions and expenditures. Respondent requests that the ALJ dismiss Complainant's complaint.

FINDINGS OF FACT

1. In June 2007, Ryan Frazier and Jay Cole (“proponents”) began working on proposed ballot initiative #38, Prohibition on Certain Conditions of Employment (“Initiative #38”). The proponents hired John Berry, Esq. to assist them in their efforts to draft Initiative #38. Curt Cervený was also involved in the drafting and oversight of Initiative #38. Mr. Cervený wears many hats. He is the owner of a political consulting firm called Politically Direct; he is also the president of a 501(c)(4) corporation registered as Protect Colorado Jobs (PCJ). Mr. Cervený has also been very involved in the activities of the right to work Issue Committee.
2. At a title board hearing on August 1, 2007, title was set for Initiative #38. On August 15, 2007, a motion for rehearing was granted. Initiative #38 was withdrawn by the proponents on September 11, 2007.
3. On September 11, 2007 the proponents submitted proposed ballot initiative #41, Prohibition on Certain Conditions of Employment (Initiative #41) with the Office of Legislative Council. The proponents as well as Messrs. Berry and Cervený were responsible for the drafting and filing of Initiative #41.
4. Initiative #41 was filed with the Secretary on September 17, 2007. At a title board hearing on October 3, 2007, title was set for Initiative #41. The ballot title was fixed on October 10, 2007, when the period for filing a motion for rehearing expired. Initiative #41 became Amendment 47 on April 28, 2008 when the Secretary deemed a random sampling of petition signatures sufficient for such a designation. Mr. Berry represented the proponents at both title board hearings and testified in both proceedings for Initiatives #38 and #41.
5. In addition to his work for the proponents of Initiatives #38 and #41, Mr. Berry assisted Mr. Cervený and Lee Chayet in organizing, forming and incorporating PCJ. PCJ was incorporated on May 4, 2007. Mr. Cervený is the president of PCJ; Mr. Chayet is its vice president; and Mr. Berry is PCJ’s secretary/treasurer and registered agent. Mr. Cervený is solely responsible for the financial affairs of PCJ and ultimately makes all the decisions about where and how PCJ spends its money. Mr. Cervený is also responsible for the day-to-day operations and financial affairs of Politically Direct. He also makes all the decisions about where and how Politically Direct spends its money.
6. Between its formation in May 2007 and April 2008, the majority of PCJ’s activities were directly related to the support of Initiatives #38 and #41. In support of the right to work initiatives, PCJ paid a portion of Mr. Berry’s legal fees, contracted with two consulting firms to obtain signatures to place the initiative on the state-wide ballot, and contributed large sums of money to the right to work Issue Committee.
7. Invoices produced at hearing (exhibit 33) establish that Mr. Berry received \$4,000 from Politically Direct and \$9,334 from PCJ for incorporating PCJ, preparing and

filing documents with the Secretary related to the right to work initiatives, and preparing for and attending the title setting hearings before the Title Board.

8. Based on the information in exhibit 33, the ALJ finds that Mr. Berry was not compensated for his time or legal work related to the activities of the Issue Committee. His work for the proponents ended on October 10, 2007, when the title was fixed. The activities Mr. Berry performed for the Issue Committee after October 10, 2007 were done on a volunteer basis; he did not receive compensation for this work by PCJ, Politically Direct or the Issue Committee.

9. On November 19, 2007, at the direction of Mr. Cerveney, Mr. Berry registered the Colorado Right to Work Committee as an issue committee with the Secretary. Its purpose is to support Initiative #41. Mr. Berry is the Issue Committee's registered agent. In his role as registered agent, Mr. Berry took all his direction from Mr. Cerveney.

10. The Issue Committee was created for the purpose of complying with the campaign reporting requirements; one of its primary goals was to get Initiative #41 placed on the ballot for the November 2008 election, which required obtaining a sufficient number of registered voters' signatures on the approved petitions.

11. Mr. Cerveney directed Mr. Berry to register the Issue Committee on November 19, 2007 so signature collection efforts could begin, a step Mr. Cerveney believed was necessary before petitions could be circulated.

12. On November 20, 2007, in a letter from the Secretary, Mr. Cerveney was notified that the Secretary had approved the petition format for Initiative #41.

13. Once he received word that the petition format had been approved, Mr. Cerveney made arrangements to begin the signature collection process. In November 2007, Mr. Cerveney and Mr. Daniel Kennedy of Kennedy Enterprises ("Kennedy") began negotiations regarding the collection of signatures. In a proposal prepared by Mr. Kennedy for the Colorado Right to Work committee dated November 14, 2007, Mr. Kennedy provided a quote for obtaining 80,000 signatures. Based on the outline of this quote, on December 10, 2007 Mr. Cerveney and Mr. Kennedy entered into a contract for the collection of signatures. The contract was signed by Mr. Kennedy and Mr. Cerveney, as Chairperson of PCJ.

14. The December 10, 2007 contract provides for the payment of \$180,000 to Kennedy by PCJ for collection of 80,000 signatures. The December 10 agreement was amended by an Addendum dated January 18, 2008, which increased the number of signatures and price per signature.

15. In order to obtain all the signatures required, Kennedy subcontracted some of the work to a group called Lamm Consulting ("Lamm"). Per the terms of the December 10, 2007 contract, PCJ paid \$20,000 to Lamm in December 2007; the check was deposited in Lamm's account on December 10, 2007. PCJ also paid Kennedy a \$25,000 non-

refundable retainer around December 24, 2007; the \$25,000 check was deposited in Mr. Kennedy's account on December 27, 2007.

16. Around the time Mr. Cerveny was negotiating the contract with Kennedy, Mr. Cervney was also designing brochures, informative materials and creating the software for formatting the petition itself; he valued the creation of the petition software at \$1,000.

17. In December 2007, Mr. Cerveny delivered to Mr. Kennedy between 100 and 200 petitions along with a list of talking points for the circulators to use in explaining the measure to the potential signers. Mr. Cerveny prepared the first batch of petitions and talking point materials that were delivered to Mr. Kennedy in December 2007.

18. Between the services of Lamm and Kennedy during the month of December 2007, nearly 5,300 signatures were obtained and turned over to PCJ on January 11, 2008.

19. The signatures collected by Kennedy were turned over to an individual named Andrew Zuppa, a designated representative of PCJ. The signed petitions were kept in a safe at the offices of American Furniture Warehouse until they were turned over to the Secretary in April 2008. There is no evidence that Mr. Zuppa was paid by PCJ, Politically Direct or the Issue Committee for his participation in the signature collection process.

20. The signed petitions were stored in the safe for protection from loss or destruction.

21. There was no evidence presented about the fair market value of the safe.

22. The Issue Committee has not engaged in much activity since the petitions were submitted to the Secretary on April 28, 2008.

23. Mr. Cerveny has donated a great deal of his time and expertise to the Issue Committee; however, not all of his time and efforts have been performed on a volunteer basis.

24. As a consultant with Politically Direct, Mr. Cerveny billed PCJ for services and materials paid for by Politically Direct in December 2007 and January 2008. The invoices between Politically Direct and PCJ reflect the following billed items: December Volunteer Sig efforts (\$10,000); First part of January Volunteer Sig efforts – Pete's & Curt's times (\$2,500); Ian's time (\$2,400); Printing brochures (\$1,872); Printing guts of petitions (\$1,378); Making backings for petitions (\$655); Mark-up (\$893.53); and Sales tax (\$301.47). The December 2007 \$10,000 invoice from Politically Direct to PCJ was paid on December 13, 2007. The January 2008 \$10,000 invoice from Politically Direct to PCJ was paid on January 7, 2008.

25. In November 2007, Ian Cerveny, Mr. Cerveny's son, set up a website for the Issue Committee (www.yesonRTW.com). The website domain name was registered on November 13, 2007 for a nominal fee of \$15. Mr. Cerveny estimated that the cost of designing the website was \$200. The website was included in at least one piece of Issue Committee literature. There is insufficient evidence to determine if Ian Cerveny was compensated for his work on the website.

26. The Issue Committee filed its first report of contributions and expenditures on January 15, 2008 for the reporting period October 1, 2007 – December 31, 2007. It reported one monetary contribution in the amount of \$1,000 from PCJ and no expenditures.

27. The Issue Committee filed its second report of contributions and expenditures on May 1, 2008 for the reporting period January 1, 2008 – April 25, 2008. It reported \$282,150 in contributions, including a \$22,000 in-kind contribution from Politically Direct and \$288,150 from PCJ, and \$306,964.16 in expenditures, including payments made to Politically Direct for petition printing and mailing and Kennedy Enterprises for signature gathering during the months of January, February, March, and April 2008.

28. Neither of the two reports of contributions and expenditures include PCJ's or Politically Direct's payments of Mr. Berry's legal fees, PCJ's \$25,000 payment to Kennedy, PCJ's \$20,000 payment Lamm, the website, the petition software or the safe at American Furniture Warehouse.

29. The \$22,000 in-kind contribution disclosed in the May 1, 2008 report represents a \$10,000 professional consulting fee that was paid to Politically Direct by PCJ for Mr. Cerveny's efforts in lining up volunteers to get signatures. The remaining \$12,000 represents petition printing costs, collateral materials, postage, mail services and office help that were paid by Politically Direct for the benefit of the Issue Committee.

DISCUSSION

Complainant asserts that Respondent failed to timely register as an issue committee and that it failed to comply with the reporting requirements of the FCPA. Article XXVIII defines an "issue committee" as, "any person, other than a natural person, or any group of two or more persons, including natural persons that has a major purpose of supporting or opposing any ballot issue or ballot question *or*¹ that has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." Colo. Const. art. XXVIII, § (2)(10)(a)(I) and (II).

The Secretary's rules, specifically 8 CCR 1505-6, Rule 1.6, define when an proposed ballot initiative becomes an "issue" for purposes of § 2(10).

¹ 8 CCR 1505-06, Rule 1.7 b (a group of persons is an issue committee only if it meets both of the conditions in Article XXVIII, Section 2(10)(a)(I) and 2(10)(a)(II).)

Rule 1.6 provides:

“Issue”, as used in Article XXVIII of the Colorado Constitution and Article 45 of Title 1, C.R.S., shall mean a “ballot issue” or “ballot question” as such terms are defined in section 1-1-104(2.3) and (2.7), C.R.S. For the purpose of Article XXVIII, section 2(10) of the Colorado Constitution, a matter shall be considered an “issue” at the earliest of the following:

- a. It has had a title designated and fixed in accordance with law;
- b. It has been referred to the voters by a governing body or the general assembly;
- c. In the case of a citizen referendum petition, it has been submitted for format approval in accordance with law;
- d. A petition has been circulated and signed by at least one person; except that, where a matter becomes an “issue” upon such signing, a person or persons opposing such issue shall not be considered an “issue committee” until one such person knows or has reason to know of the circulation; or
- e. A signed petition has been submitted to the appropriate election official in accordance with law.

In accordance with Rule 1.6 a, the proposed ballot initiative #41 became and “issue” on October 10, 2007, when the period for filing a motion for rehearing with the title board expired. Mr. Berry, as its registered agent, registered Respondent as an issue committee with the Secretary on November 19, 2007. There is no question that the Issue Committee is a group of two or more persons that has a major purpose of supporting a ballot issue. However, that fact alone does not trigger the registration requirement. In order to find that the Committee had a duty to register with the Secretary prior to November 19, 2007, the evidence must also show that between October 10, 2007 and November 18, 2007, the Committee accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue.

Under Article XXVIII, § 2(5)(a)(I) – (IV), a “contribution” is defined as:

(I) the payment, loan, pledge, gift, or advance of money, or guarantee of loan made to any candidate committee, issue committee, political

committee, small donor committee, or political party; (II) any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party; (III) the fair market value of any gift or loan of property made to any candidate, issue, political, small donor committee or political party; or (IV) anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall or election.

And under Article XXVIII, § 2(8)(a), an "expenditure" is defined as:

any purchase, payment distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

Contributions

Complainant argues that the payment of Mr. Berry's legal fees by both PCJ and Politically Direct were contributions to the Issue Committee that were received before November 19, 2007 and were unreported. Complainant further asserts that the non-refundable retainers that were paid to Lamm and Kennedy by PCJ in December 2007, the creation of the website, Mr. Cervený's petition software development, and the use of the safe at American Furniture Warehouse were also contributions to the Issue Committee that were not reported. Finally, Complainant asserts that the \$22,000 in-kind contribution by Politically Direct to the Issue Committee was inaccurately reported. For the following reasons, the ALJ concludes that Mr. Berry's legal work was not a contribution to the Issue Committee. The ALJ further concludes that the use of the safe at American Furniture Warehouse was not a contribution to Issue Committee. However, the ALJ does conclude that the December 2007 payments from PCJ to Kennedy and Lamm, the website, and the petition software are contributions to the Issue Committee that should have been disclosed in its January 15, 2008 report.

Mr. Berry's Legal Fees

Between July and January 2008, Mr. Berry received compensation by PCJ and Politically Direct in the amount of \$13,334. The evidence presented at hearing establishes that Mr. Berry was hired to incorporate PCJ and assisted the proponents of the right to work initiatives in their efforts to get the title set and the ballot petition approved by the Secretary. Mr. Berry's legal work on behalf of the proponents ended after the title was fixed on October 10, 2007. The fees Mr. Berry received after October 10, 2007, were related to the work he performed for PCJ and not the Issue Committee or the proponents. Even if Mr. Berry's work, prior to October 10, 2007, benefited the

Issue Committee, his fees cannot be considered a contribution to the Issue Committee because there was no ballot issue until October 10, 2007.

Between November 19, 2007 and January 15, 2008, Mr. Berry did two things for the Issue Committee: He registered it and filed its first report of contributions and expenditures. Mr. Berry did not charge the Issue Committee for these services nor did he receive any compensation for performing these tasks. Rather, he performed this work on a volunteer basis. Mr. Berry's work for the Issue Committee after October 10, 2007 was not a contribution because it was volunteer work completed by an attorney, which falls under the contribution exception contained in § 2(5)(b), Article XXVIII, and Secretary Rule 1.3 b.²

PCJ's December 2007 Payments to Kennedy and Lamm

Respondent claims that the December 2007 payments by PCJ to Kennedy and Lamm are not contributions because they were done for the benefit of the proponents, not the Issue Committee. The ALJ finds this argument unpersuasive and in direct conflict with the testimony of Mr. Cervney and Mr. Berry, the two individuals responsible for establishing the Issue Committee. Mr. Cervney specifically instructed Mr. Berry to register the Issue Committee with the Secretary in November 2007 so the signature collection efforts could begin. And it was Mr. Berry who testified that the Issue Committee was created for the purpose of complying with the campaign reporting requirements; one of its primary goals was to get Initiative #41 placed on the ballot for the November 2008 election, which required obtaining a sufficient number of registered voters' signatures on the approved petitions.

If the signature collections that started in December 2007, which were paid for by PCJ, had been done solely for the benefit of the proponents and not for the Issue Committee, as Respondent suggests, it is difficult to understand why Mr. Cervney instructed Mr. Berry to register the Issue Committee in November 2007. The only reasonable inference that can be drawn from Mr. Cervney's directive to Mr. Berry to register Respondent before petitions were circulated is that Mr. Cervney understood that the signatures were being collected for the benefit of the proponents as well as the Issue Committee. The December 2007 signatures comprised a portion of the entire batch of petitions that were turned into the Secretary in April 2008. The Issue Committee clearly derived a benefit from the efforts of Mr. Kennedy and Mr. Lamm and those efforts were paid for, in part, by PCJ's initial non-refundable December 2007 payments. According, the ALJ concludes that the two non-refundable retainer

² The exception stated in section 2(5)(b) of the State Constitution that "'Contribution' does not include services provided without compensation by individuals volunteering their time", applies only to services provided solely on the basis of time (such as legal advice, bookkeeping, computer consulting and programming, web mastering, etc.). The exception may include time-based services volunteered by an individual as a member of any firm, association, or other business entity, including a corporation, if such individual receives no direct or indirect compensation for the time volunteered. If a tangible product is produced as a result of such services, "contribution" includes the reasonable value of the materials involved, unless such value is negligible.

payments made by PCJ in December 2007 to Kennedy and Lamm are contributions to the Issue Committee and should have been reported in its January 15, 2008 report.

Committee's Website and Petition Software

In November 2007, Ian Cerveny created a website for the Issue Committee (www.yesonRTW.com). The website was registered on November 13, 2007; the registration fee was \$15. Ian Cerveny did not testify at hearing; however, his father, Mr. Cerveny, who appeared on behalf of the Respondent at hearing, estimated the cost of the website at \$200. Complainant asserts that the website and registration fee should have been disclosed as contributions to the Issue Committee. Respondent disagrees, arguing that the work done to create the website was done on a volunteer basis and there is no fair market value placed on the website production; Mr. Cerveny's estimate of the cost was only speculative and should not be relied on to assess fair market value. The ALJ finds Respondent's argument unpersuasive. Regardless of whether Ian Cerveny donated his time to design the website, the website itself has value and as a tangible product of the donated services can be considered a contribution. See Rule 1.3 b. Moreover, the ALJ concludes that the website was a benefit to the Issue Committee. At least one piece of the Issue Committee's campaign literature includes a reference to its website. This fact indicates that the Issue Committee believed the website would benefit its purpose. With regard to Respondent's argument about the evidence concerning the fair market value of the website, the ALJ concludes that Mr. Cerveny as a designated representative can and did provide an estimate of the fair market value of the website that can be used to determine its value.

Mr. Cerveny developed petition software that he used to design the petitions used by Kennedy and Lamm. Complainant contends that this piece of intellectual property was a contribution to the Committee and should have been reported. Respondent contends that Mr. Cerveny's petition software was not a contribution to the Committee because the property was created by Mr. Cerveny without compensation and it was not created as a benefit for the Issue Committee, but for the proponents. As stated above, § 2(5)(b) of Article XXVIII and Rule 1.3 b exclude as reportable contributions services provided without compensation by individuals volunteering their time. There is no evidence that Mr. Cerveny was compensated for his time creating the software. However, as further stated in Rule 1.3 b, "[i]f a tangible product produced as a result of such services, 'contribution' includes the reasonable value of the materials involved, unless such value is negligible." The question then becomes: Was the software a benefit to the Issue Committee and if so what is its fair market value?

The ALJ concludes that the petition software was a benefit to the Issue Committee. The fact that Mr. Cerveny may have developed it for some one other than the Issue Committee is immaterial. Mr. Cerveny developed it and used it to create the petitions that were circulated. He also provided the petitions he created to Kennedy and Lamm and did so knowing that the petitions were being circulate to get the initiative on the ballot. Without the circulation of the petitions, there would be no ballot issue for the Issue Committee to support. As for its fair market value, the ALJ accepts Mr. Cerveny's value of \$1,000.

Safe at American Furniture Warehouse

As signatures were collected, the signed petitions were turned over to Mr. Zuppa, a representative from PCJ, for storage in a safe maintained at American Furniture Warehouse. The signed petitions were kept in the safe until they were turned over to the Secretary in April 2008. Complainant contends that the use of the safe was a contribution to the Issue Committee. Respondent argues that it was not because the storage of the petitions was done on behalf of the proponents and not the Issue Committee and because the use of the safe has no fair market value. The safe may have been a benefit to the Issue Committee; however, Respondent is correct that there was no evidence at hearing concerning the fair market value of the safe. For that reason, the ALJ cannot and does not conclude that the use of the safe at American Furniture Warehouse was a contribution to the Issue Committee.

Politically Direct's In-kind Contribution to the Issue Committee

In early January 2008, Politically Direct made an in-kind contribution to the Issue Committee that was reported in its May 2008 disclosure report. Ten thousand dollars of the contribution represents Mr. Cerveny's professional consulting fees. The remaining \$12,000 represents materials that were paid for by Politically Direct for: petition printing costs, collateral materials, postage, mail services and office help. Complainant asserts that this contribution was inaccurately reported in that the real donor was PCJ, not Politically Direct, and therefore Respondent concealed the actual identity of the donor. Respondent claims that the contribution was accurately reported; the professional services of Mr. Cerveny were performed in his capacity as a political consultant for Politically Direct and the cost associated with the petition and brochure printing were incurred by Politically Direct. It is undisputed that PCJ reimbursed Politically Direct \$10,000 for Mr. Cerveny's time, Ian Cerveny's time, printing costs and the backing for the petitions; however, this fact alone does not convince the ALJ that the \$22,000 in-kind contribution was inaccurately reported. The evidence presented at hearing does show that Politically Direct was merely a conduit for PCJ to fund the Issue Committee, as Complainant suggests.

Expenditures

Finally, Complainant argues that the Issue Committee also failed to report all the expenditures it made, including: PCJ's payments to Kennedy, Lamm, as well as the payment of Mr. Berry's legal fees and \$15 website domain registration fee. It is Complainant's contention that the Issue Committee was required to disclose these items as contributions as well as expenditures because there was coordination of campaign efforts among and between PCJ, Politically Direct, and the Issue Committee. First, the ALJ concludes that the evidence does not establish a level of coordination sufficient to find that the Issue Committee should have reported these payments as expenditures. Second, the ALJ has determined that not all of these items were contributions to the Issue Committee. Finally, the coordinated expenditure argument referred to in Complainant's written closing argument, citing *Rutt v. Colorado*

Educational Ass'n, 151 P.3d 585 (Colo. App. 2006), *rev'd on other grounds*, 184 P.3d 65 (Colo. 2008), is not instructive in this case. The coordinate expenditure argument presented in *Rutt* concerned the definition of "Independent expenditure" in § 2(8)(a), Article XXVIII, which applies to third party expenditures and candidates or candidate committees, not issue committees.

Registration and Reporting Requirements

Initiative #41 became an "issue" as used in Article XXVIII of the Colorado Constitution and Article 45 of Title 1, C.R.S. on October 10, 2007. Mr. Berry registered Respondent with the Secretary on November 19, 2007. As discussed above, the ALJ has concluded that the evidence fails to establish that the Issue Committee accepted or made contributions or expenditures in excess of two hundred dollars to support Initiative #41 prior to November 19, 2007. The items the ALJ has concluded were contributions occurred after November 19, 2007. Therefore the Issue Committee did not untimely register as Complainant alleges. Under § 1-45-108(1)(a)(I), C.R.S., all issue committees must also report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made, and obligations entered into by the committee. The Issue Committee's first report was filed on January 15, 2008 for the reporting period October 1, 2007 – December 31, 2007. It reported one monetary contribution in the amount of \$1,000 from PCJ and no expenditures. The ALJ concludes that the Issue Committee's January 15, 2008 report is inaccurate in that it failed to disclose as contributions: PCJ's December 2007 payment to Kennedy in the amount of \$25,000, PCJ's December 2007 payment to Lamm in the amount of \$20,000, the \$200 website, the \$15 registration fee, and the \$1,000 petition software created by Mr. Cervney.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const, art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.
2. The issues in a hearing conducted by an ALJ under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII, or Section 1-45-108, 114, 115, or 117, C.R.S. (2008). Colo. Const. art. XXVIII, § 9(2)(a). If an ALJ determines that a violation of one of these provisions has occurred, the ALJ's decision must include the appropriate order, sanction or relief authorized by Article XXVIII. Colo. Const. art. XXVIII, § 9(2)(a).
3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)³. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against the

³ Section 24-4-101, *et seq.*, C.R.S. (2008)

Respondent for violations of the Colorado Constitution and the FCPA. Accordingly, Complainant has the burden of proof.

4. Complainant has not established, by a preponderance of the evidence, that Respondent violated the provisions of § 1-45-108(3), C.R.S. by failing to timely register as an issue committee.

5. Complainant has not established, by a preponderance of the evidence, that Respondent violated § 1-45-108(1)(a)(I), C.R.S. by failed to report all its expenditures in its January 15, 2008 report or that the \$22,000 in-kind contribution in its May 2008 report was inaccurately reported.

6. Complainant has, however, established, by a preponderance of the evidence, that Respondent violated the provisions of § 1-45-108(1)(a)(I), C.R.S. by failing to disclose all its contributions in its January 15, 2008 report.

AGENCY DECISION

It is the Agency Decision of the ALJ that Respondent failed to comply with reporting and disclosure requirements in § 1-45-108(1)(a)(I), C.R.S. by failing to disclose all its contributions in its January 15, 2008 report.

Once a violation has been established, the ALJ must include in the Agency Decision the appropriate order, sanction or relief authorized by the FCPA. Colo. Const. art. XXVIII, § 9(2)(a). Accordingly, an order issued by the ALJ in this case must relate to a violation of one of the identified constitutional or statutory provisions, and any sanction must be authorized by Article XXVIII of the Colorado Constitution. One sanction authorized by Article XXVIII is the imposing of a \$50 penalty for each day that a statement or other information required to be filed pursuant to section 5, section 6, or section 7 of Article XXVIII or sections 1-45-108, 109 and 110, C.R.S. is not filed by the close of business on the day due. However, since ALJ is not “the appropriate officer” for purposes of this section, she is therefore not required to impose a \$50 per day sanction and has discretion to reduce a penalty upon a showing of good cause. See, Colo. Const. art. XXVIII, § 10(2)(b)(I).

The ALJ has concluded that Respondent violated § 1-45-108(1)(a)(I), C.R.S. by failing to report all its contributions in its January 15, 2008 report. Complainant requests that the ALJ assess a \$50-per-day penalty for each unreported contribution. Respondent argues that the \$50-per-day penalty applies to the report itself and not the individual violations in the report. The ALJ finds merit in Respondent’s argument that the \$50-a-day penalty applies to each report and not to individual violations within the report. Accordingly, the ALJ imposes a civil penalty in amount of \$9,750 (\$50 per day for 195 days: January 16, 2008 – July 29, 2008 - the day after the first report was filed to the date of hearing).

This decision is subject to review with the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

DONE and SIGNED

October 15, 2008

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by e-mailing and placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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DATED: _____

Court Clerk